

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### I.

### Opinion of the Court Below.

Neither the trial court nor the Supreme Court prepared or delivered any opinion. Va. Code, Sec. 6348, as is usual in such cases.

### II.

### Jurisdiction.

The date of the judgment to be reviewed is October 5, 1943. The jurisdiction of the court is invoked under Sec. 240(a) of the Judicial Code as amended, C. 229, Sec. 1, 43 Stat. 938, 28 U. S. C. A. Sec. 347.

### III.

### Statement of the Case.

The facts stated in the foregoing petition (p. 1) are hereby adopted as a part of this brief; to which we here add: There was no affidavit as required for default judgment, nor was any attorney appointed or approved for the defendant Hobart Scyphers, and there was no finding facts to justify the court's action.

### IV.

### Specifications of Error.

*There was no appearance by Hobart Scyphers, no affidavits, no attorney appointed to defend him, and nothing to show his military service did not materially affect his defense.*

POINT I.

The Supreme Court erred in not reversing the decree of the lower court, because Hobart Scyphers had not appeared

in the case, and no affidavit was filed, nor any attorney was appointed to defend him, nor was there any finding of fact to show his ability to conduct his defense was not materially affected by his military service, and the trial court, notwithstanding entered a decree adjudicating the principles of the cause, fixing the liens, their priorities, and ordered a sale of all of petitioner's property, including that affected by the trust, unless petitioner, or some one for her, would pay all the lien debts, within twenty days, and that without any finding of fact by said court to justify its opinion that the ability of Hobart Scyphers, who was interested, to comply with said order would not be materially affected by his military service, as provided by the Soldiers' and Sailors' Relief Act.

This act must be liberally construed to protect this soldier, and:

> "Absence when one's rights or liabilities are being adjudged is usually prima facie prejudicial". *Boone* v. *Lightner*, — U. S. —, 87 L. Ed. 1099, Advanced sheets; decided June 7th, 1943.

To this presumption add the fact, that Hobart Scyphers had not appeared, and no affidavit was filed, nor any attorney appointed to defend his interest, as peremptorily required by the statute, and we have a case where he was denied all the safeguards provided for him, and the millions of others in the service, for whose protection the statute was enacted. No need to enact such laws if the courts fail to give them effect, which has been done in this case, unless this Court will lend its aid. The purpose of the Act was to strengthen the national defense, by a suspension of civil liabilities under such conditions as surround Hobart Scyphers in this case; but such laws only give the word of promise to the ear while breaking it to the heart, if courts can ignore them. No matter on whom is cast the burden of

showing his ability to make his defense is not materially affected by his military service; by the *terms* of the *act* the court must stay the proceedings against any and all persons in military service *unless there are facts sufficient to justify the opinion of the court that this is not the case.* This must appear or the stay *must* be ordered. Its appearance must precede any action of the court except to stay the proceedings.

POINT II.

*The Supreme Court of Appeals erred in affirming the judgment of the trial court in refusing to enjoin or stay the proceedings as requested.*

This was a lien creditors' suit, which implies, at the time, inability to pay, by petitioner. While the amount affecting this trust property, $3,028.28, is not large in comparison with present day transactions, yet it was between a class, as is evident from the record, not accustomed to transactions entering into higher brackets. We find in the record such amounts as $678.10, $559.14, $61.00, $48.80, $791.67, $317.63 (R. 24), which denotes relatively small transactions; yet such will utterly ruin a man of small means, and leave him and his family destitute, if creditors are allowed unrestrictedly to push such claims against one hard pressed while at home, much less one who can not make any defense because detained in military service, and doubly so one who must *comply with such judgments or decrees*, and at the same time expose himself to destruction while thousands of miles away, without any chance of coming into court or attending to private affairs. It is just such a case as this we have at bar the act was intended to protect. As said by Professor Wigmore, when the prototype of this act was before the committee,

> "It is the small man, or perhaps I should say the humble man, who has just himself and no agent and no

outside assets, that we don't want to forget. He is the man we are thinking about." Hearings before Senate Judiciary Committee, S. 2859, and H. R. 6361, 65th Cong. 1st and 2d Ses., p. 97.

To allow one whose primary job is that of a soldier, whose purpose is to defend himself, friends, relatives and country, to be harassed and distracted by civil litigation, was the purpose of this statute to prevent. While such is the case, he should have the satisfaction of knowing his private affairs and property are free from such assaults at home. We at home would not be secure should he be compelled to attend to such; and courts should be astute to enforce such statutes enacted for his protection in his absence. But it may be said on his return he can have this injustice undone. We reply he should not be required to do this as the price for his honorable service, but should be protected at the outset; and under our Virginia Statute, Code Sec. 6306, Appendix B, he could not recover the land but only have a lawsuit for the proceeds, which is not adequate protection. It amply appears in this record that this man's services in the army both materially affects him in conducting his defense in court and his ability to comply with the court's decree to pay or the property be sold. The actions of the Virginia Courts have failed to enforce this statute enacted for his protection; so we now humbly pray this court to do him the justice Congress in its wisdom provided.

**Conclusion.**

For the foregoing reasons we respectfully submit that the action of the Supreme Court of Appeals of Virginia has failed to give the protection Congress intended by the enactment of this Statute, and that the instant suit ought to be reviewed on certiorari, and a correct rule laid down by this Court, and established for the guidance of all courts in

this and other cases affected by this Act, and the cause then remanded for further proceedings accordingly.

Respectfully submitted,

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Clintwood, Virginia.
December 23, 1943.